

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25/02/2003

CORAM

THE HONOURABLE MR.JUSTICE A.S.VENKATACHALAMOORTHY
AND
THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

A.S.No.472 of 1988

1. United India Insurance Co. Ltd.
Divisional Office No.10400
"Lakshmi Bhavan"
III Floor, 609, Anna Salai
Madras 600 006,
rep. by its Assistant Manager
N.Venkataramani
2. Chemicals and Plastics India
Ltd.,
"Dhun Building",
827, Mount Road,
Madras 600 002,
rep. by its Assistant Manager
N.Venkataramani
(Cause title accepted as per
order of Court dated 3.3.88 in
CMP 5056/88) .. Appellants

-Vs-

A.V.R.Transporters & Exporters
Private Limited,
No.59, Bajaj Bhavan,
Nariman Point, Bombay 400 021,
Branch at "Chordia Mansion",
4th Floor, 739, Mount Road,
Madras 600 002. .. Respondent

This appeal suit is filed under S.96 of The Code of Civil Procedure
against the judgment and decree of the VIII Assistant City Civil Judge, Madras
made in O.S.No.1661 of 1985 and dated 31.1.1986.

!For Appellants : Mr.G.Desappan

^For Respondent : Mr.R.Krishnaswami,
Senior Counsel
for Mr.C.Ramesh
:JUDGMENT

M.CHOCKALINGAM, J.

The plaintiffs are the appellants herein.

2. This appeal is directed against the judgment of the learned VIII Assistant City Civil Judge, Madras dismissing the suit filed by the appellants/plaintiffs.

3. The appellants/plaintiffs filed the suit for recovery of a sum of Rs.41,906.85 with subsequent interest at 18% per annum from the date of plaint till realisation with the following averments:

The second plaintiff has entrusted a consignment consisting of 9150 MT of Ethylene Dichloride with the respondent/defendant for carriage to their plant at Metturdam under LR No.53 dated 10.10.1981. The said consignment was insured with the first plaintiff vide policy No.104/83/1/5443/81. The lorry which carried the consignment met with an accident on 11.10.1981 near Mecheri enroute to Mettur Dam. On receipt of the said information, the second plaintiff conveyed the same to the defendant by a letter dated 12.10.1981 to take necessary action. A reply was sent by the defendant stating that a police complaint was given. The Senior Divisional Manager of the first plaintiff firm at Salem arranged for the survey to assess the damage caused to the consignment. The surveyors M/s.K.Mariappan Associates submitted their report on 13.11.1981 stating that the entire consignment was leaked out, evaporated and mixed with sand and mud resulting in total loss of the consignment. A claim was made by the second plaintiff with the defendant by a letter dated 19.7.1982 to compensate the loss sustained by them. A claim letter dated 12.11.1982 was also sent. But, the defendant neither replied nor settled the claim made therein. On a claim made by the second plaintiff with the first plaintiff, the first plaintiff as an insurer settled the claim by paying a sum of Rs.41,906.85. By virtue of letter of subrogation and special power of attorney executed by the 2nd plaintiff in favour of the 1st plaintiff, the rights of the 2nd plaintiff are subrogated to the 1st plaintiff. Hence this suit.

4. The suit was contested by the defendant by filing a written statement in the following manner:

The plaintiffs have suppressed the material facts. Pursuant to the quotation called for by the second plaintiff by letter dated 30.7.1981, the defendant gave a quotation. The terms of the contract are set down in the form of confirmation letter given by the 2nd plaintiff dated 21.9.1981. Clause Nos.3 and 5 of the said terms of confirmation make it very clear the liability of the defendant carrier. It is true that the lorry was met with an accident on 11.10.1981. The loss to the consignment is covered under Clause 3 of the said terms of contract. The loss has to be compensated from the insurance company. The second plaintiff can well recover the money from the first plaintiff insurance company. The liability of the defendant has been restricted only to the loss or damage occasioned to the vehicle employed and third party risks. The report of the Surveyor would not bind the defendant. The defendant was not given any notice of any survey. While the second plaintiff is not entitled to recover any money, the first plaintiff cannot claim the money on the ground of non delivery of consignment. The loss has occurred due to the accident which is beyond the control of the defendant. Hence, the suit may be dismissed with costs.

5. The trial Court framed the necessary issues, tried the suit and dismissed the same. Being aggrieved by the judgment of the lower Court, the

plaintiffs have come forward with the instant appeal.

6. The plaintiffs laid the civil action for recovery of a sum of Rs.41,906.85 with subsequent interest. Admittedly, the second plaintiff entrusted with the defendant carrier a consignment consisting of 9150 Metric Tonne of Ethylene Dichloride for carriage to their plant at Mettur Dam on 10.10.1981. The lorry loaded with the said consignment met with an accident on 11.10.1981 at 11.30 A.M. near Mecheri enroute to Mettur Dam. On receipt of the information about the accident, the second plaintiff conveyed the same to the defendant carrier by a letter dated 12.10.1981 to take necessary action in that regard. Consequently upon the same, the defendant gave a complaint to the police and instructed the lorry owner to contact the Plant Manager of the second plaintiff for conducting an insurance survey. Accordingly at the instance of the first plaintiff with whom the consignment was insured, a survey was conducted to assess the damage caused to the consignment due to the accident. The survey report revealed that the entire consignment was leaked out, evaporated and mixed with the sand and mud resulting in total loss of the same. Under such circumstances, the second plaintiff made a claim with the defendant by a letter dated 19.7.1982 to compensate the loss sustained by them and again sent another claim letter dated 12.11.1982. But, the claim was not settled by the defendant. In such circumstances, the second plaintiff made its claim before the first plaintiff Insurance Company, which settled the same by paying a sum of Rs.41,906.85 being the value of the consignment. The second plaintiff subrogated its rights to the first plaintiff to recover the same from the defendant by a letter of subrogation and special power of attorney executed by the second plaintiff in favour of the first plaintiff.

7. While the admitted facts are so, the first plaintiff Insurance Company has made the instant claim against the defendant, wherein the second plaintiff was also added as a co-plaintiff. The defendant inter alia has vigorously contested the suit stating that no negligence can be attributed to the defendant for the accident occurred; that the defendant was not liable to meet the claim of the plaintiffs, in view of the special contract entered into between the parties before the transportation of the consignment from Madras to Mettur Dam, wherein the second plaintiff agreed to make arrangements for the transit risk for the products, and hence, the second plaintiff should recover the moneys from the insurer namely the first plaintiff.

8. The learned Counsel appearing for the appellants/plaintiffs would submit that the lower Court was not correct in rejecting the claim of the plaintiffs; that it is pertinent to note that the accident has occurred due to the negligence on the part of the defendant only; that the defendants themselves gave the damage certificate accepting the damage caused to the consignment and its value therefor; that it was not open to them to go back on their own damage certificate and object to the survey report which was only in the nature of confirmation of the assessment already made; that it has to be noted that the survey was conducted at the instance of the defendant, and it was never open to the defendant to contend that they were not bound by the said survey report; that the negligence was always presumed in any accident unless it had been rebutted by those who pleaded that there was no negligence on their part; that the lower Court erred in finding the Clause (3) of the agreement as a special contract between the parties; that the said clause referred only to insurance, and it never referred to restriction of claim on the part of the first plaintiff; that it is pertinent to note that there could

not be any special contract for giving up any compensation due to negligence; that even if Clause (3) of the contract was to be taken as a special contract, the same was hit by S.23 of the Contract Act; and hence, the judgment and decree of the lower Court cannot be sustained, and they are liable to be set aside and the suit be decreed as prayed for.

9. Countering to the above contentions, the learned Senior Counsel Mr.R.Krishnaswami, appearing for the respondent/defendant would contend that in view of the special contract entered into between the parties before the transportation of the consign , the respondent was not liable to meet the suit claim; that the lower Court only on proper appreciation of oral and documentary evidence has found that the defendant was not liable to make good the loss, and hence, the judgment and decree of the trial Court have got to be sustained and the appeal be dismissed.

10. After careful consideration of the rival submissions and scrutiny of the evidence both oral and documentary, the Court is of the considered view that there is no substance in this appeal.

11. The defendant in its written statement has specifically pleaded the special contract that was entered into between the parties and has marked the same as Ex.B2 dated 21.9.1981, wherein the terms of the special contract were set out. Clause (3) he said contract reads as follows:

"3. INSURANCE:

Chemplast will make arrangements for transit risk for the product only. You will be fully responsible for any loss, damage, etc., to your chassis, tanker and crew, it will be your responsibility to insure chassis, tanker, crew and also cover any third party risks."

A very reading of the above clause would clearly reveal that the second plaintiff has agreed that they would make arrangements for the transit risk for the products only viz. the consignment in question. It has also been further agreed under the said clause that the defendant would be responsible for any loss, damage, etc., for its chassis, tanker and crew and also to cover any third party risks, which would clearly indicate that the liability of the defendant was limited to that extent only, and it cannot be extended further. In view of the specific terms of the agreement wherein the second plaintiff themselves undertook the transit risk for the consignment, they cannot now be permitted to say that the defendant was liable to make good the loss.

12. Needless to say that the second plaintiff cannot execute a letter of subrogation in favour of the first plaintiff Insurance Company in respect of certain rights which were not available for them under the contract entered into between the parties. It was contended by the learned Counsel for the appellants that there was no special contract between the parties; that Ex.B2 was not a concluded contract, but it was only a letter addressed by the second plaintiff to the defendant, which was not accepted by the defendant subsequently, and thus, the terms found under Ex.B2 would not be binding on the plaintiffs. This contention cannot be countenanced for two reasons. Firstly, in the grounds of appeal, the appellants have attacked Clause 3 of the special contract referred to above and not the contract itself, and even after the terms of the special contract were specifically averred in the written statement, they were not denied by the plaintiffs by filing a rejoinder. Secondly, the special contract under Ex.B2 was confirmed by the second plaintiff under Exs.B3 and B4 communications dated 14.7.1982 and 19.7.1982 respectively. Hence, the plaintiffs cannot now be permitted to

raise any plea stating that there was no special contract between the parties.

13. Apart from all the above, the defendant was not put on notice when the survey was made at the instance of the first plaintiff. P.W.1 who was examined on the side of the first plaintiff, has categorically admitted that as per the provisions of Indian Law, all the parties concerned should be served with notice as to the survey to be made, and in the instant case, no notice was served on the defendant, and he could not tender any explanation why the defendant carrier was not served with the necessary notice before the survey was made. For all the reasons stated above, the plaintiffs cannot maintain a claim against the defendant on the basis of Ex.A9 letter of subrogation. Hence, the lower Court was perfectly correct in dismissing the suit. The Court is unable to see anything to interfere in the judgment of the Court below.

14. In the result, this appeal suit is dismissed confirming the judgment and decree of the lower Court. The parties will bear their own costs.

Index: yes

Internet: yes

To:

1. The Registrar

City Civil Court

Madras

2. The Record Keeper

V.R.Section

High Court, Madras

nsv/

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